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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1982

CEL-A-PAK,
*Petitioner,*

vs.

CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD and UNITED FARM WORKERS, AFL-CIO,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD H. FOSTER
703 Market Street
San Francisco, CA 94103
Telephone (415) 982-1901
*Attorney for Petitioner*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

## QUESTIONS PRESENTED FOR REVIEW

I

Is the United Farm Workers union subject to the prohibitions against secondary boycotts provided in the National Labor Relations Act, particularly in view of *National Broilers Marketing Association v. U.S.*, 436 U.S. 816?

II

Can a State labor relations board be enjoined by the U.S. District Court from regulating labor relations subject to the National Labor Relations Act, particularly where the National Labor Relations Board has held the employees and employers involved subject to the act?

III

Can States in view of the commerce clause regulate the labor relations of interstate agriculture?

IV

Is the agricultural exemption contained in the National Labor Relations Act unconstitutional as depriving employers, employees and unions in the agricultural industry of equal protection of the law?

V

Does the 1979 amendment to Rules 3C of the appellate rules allow a motion for injunction pending appeal to be considered as an informal notice of appeal in order to reach the merits of controversy?

VI

**In view of the conceded fact that the Rule 60b motion was reviewable by the Court of Appeals, can the issue of the failure to exercise jurisdiction by the District Court be reviewed?**

VII

**Can a District Court refuse to exercise jurisdiction on "case or controversy" grounds on the question of whether State or Federal law controls an appeal on labor relations unless a union has actually won an election in view of this Court's decisions in *Babbitt v. United Farm Workers*, 442 U.S. 289, and *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115?**

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### OPINIONS BELOW

The opinion of the Court of Appeals filed July 2, 1982 is reported in F2d. A copy is printed as Appendix A. The Court of Appeals without opinion denied petitioner's petition for rehearing on July 28, 1982. The District Court's order of dismissal is printed as Appendix B.

### JURISDICTION

The opinion of the U.S. Court of Appeals of the Ninth Circuit was filed on July 2, 1982. Cel-A-Pak's timely petition for re-hearing was denied on July 28, 1982. The jurisdiction of the Court is invoked under 28 USC 1254 (1).

## STATUTORY PROVISION INVOLVED

Rule 3c of the Appellate rules provides in pertinent part:

> An appeal shall not be dismissed for informality of form or title of notice of appeal.

## STATEMENT OF THE CASE

This action involves a complaint filed October 27, 1976, requesting a declaratory judgment, declaring the petitioner, its employees and the United Farm Workers were subject to the National Labor Relations Act; for damages against the UFW for a secondary boycott, in violation of the National Labor Relations Act; and for an injunction against the State Agricultural Labor Relations Board, enjoining its processing of unfair labor practice complaints, its supervision of an election then pending and its regulation of petitioner's labor relations in general.

In the approximately six years that this complaint has been outstanding, according to the Opinion of the district court, two other elections were processed, including one which was being processed at the time the district court dismissed the complaint.

Petitioner is a packer of cauliflower in the Salinas Valley; it does no farming. The particular employees who were the subject of the organizational activities were harvester-trailer pullers. They harvest cauliflower, load it onto trailers and drive it to the edge of the fields adjacent to the highway, where truck drivers pick up the cauliflower and transport it to the packing shed. The cauliflower is then processed, wrapped in cellophane and transported in interstate commerce.

The National Labor Relations Board, in the *Grower-Shipper*-Cel-A-Pak case, 230 NLRB 150, specifically found that petitioner's employees, who operated auxiliary equipment, that is, the harvester trailer pullers, were subject to the National Labor Relations Act. However, the State Labor Board has consistently refused to deny jurisdiction and has continued to supervise petitioner's labor relations despite this Court's decision in *Bayside Enterprises v. NLRB*, 97 Sup.Ct. 576. The State Labor Board itself has never accepted this matter for hearing. However, the Regional Director, in an Opinion which is attached as Exhibit "C" to petitioner's Application for Injunction Pending Appeal, before Judge Rehnquist as Circuit Justice, found that the employees were subject to the jurisdiction of the State Act. While we disagree with the conclusions contained in the Opinion, the summary of facts is, in general, accurate. Throughout the six years of this litigation, the UFW has conducted a secondary boycott of petitioner, in violation of the National Labor Relations Act.

The case has never been tried on the merits.

In April of 1977, the district court deferred to State regulation and dismissed the complaint, holding that petitioner's remedy lay only with the State administrative and judicial system. Appeal was then taken to the Court of Appeals for the Ninth Circuit. The Court of Appeals, in an Opinion filed October 29, 1978, remanded the case "to the district court for further proceedings and reconsideration in light of recent events." It is to be noted that after submission before the Ninth Circuit, another representational election was pending. However, by the time the case reached the district court for the second time, that election had been concluded.

An amended complaint was then filed, setting forth approximately thirty different instances of State regulation of petitioner's labor relations by the State of California. The matter was then briefed, argued, and on April 19, 1979, the case was again submitted before the district court.

While the case was submitted and just prior to the filing of the court's Order of dismissal (see footnote 4, district court Opinion), the UFW filed a preliminary election petition and this fact was called to the attention of the court. However, without waiting to determine the result of the election process or considering whether it could be properly enjoined, the district court ordered the case dismissed, without considering the merits, and held that there was no case or controversy.

As stated in the second Opinion of the Court of Appeals:

> "'several hypothetical events would have to occur before such a certification [of a union as bargaining representative] might pose a realistic threat of injury—a labor organization would have to file the requisite petitions, win the election, and the ALRB would have to decide that it has jurisdiction over these employees.'"

Shortly after the filing of the district court's Opinion, the State of California commenced its processes under the State Agricultural Labor Relations law. After the ten-day period allowed for filing of a motion for new trial, but before the thirty-day period for filing a notice of appeal, petitioner filed a motion under Rule 60b for reconsideration in light of the threatened State action. In addition, petitioner filed a motion for an injunction pending appeal to the Ninth Circuit as required by the appellate Rules.

The district court did not rule on either the motion for injunction pending appeal or the motion for reconsideration under Rule 60b until after thirty days from the September 4 judgment. It denied both motions. Appeal was then taken to the Court of Appeals for the Ninth Circuit.

Shortly before oral argument, the Court of Appeals raised as of its own motion the question of whether the appeal was barred under Rule 4a of the Federal Rules of Appellate Procedure. The matter was submitted in August of 1981, and no decision was reached by the Court of Appeals until July of 1982, slightly less than one year later. The Court of Appeals, again without reaching the merits, dismissed the appeal, refusing to consider the motion for an injunction pending appeal as an informal notice of appeal under Rule 3 of the appellate Rules, and declaring further that the district court was correct, even under the Rule 60b motion, in holding that "cognizable injury was still speculative and hypothetical." The court adopting the rationale stated above by the district court.

It is to be noted that for more than six years, the Federal courts have failed to rule on whether a State administrative labor body can regulate labor relations of an employer who has been found subject to the National Labor Relations Act by the National Labor Relations Board.

## REASONS FOR GRANTING THE WRIT

### 1. The dismissal of the appeal for defects in the Notice of Appeal is in conflict with the decisions of other courts of appeals, in opposition to decisions of the Supreme Court, and violates provisions of Rule 3c of the Federal Rules of Appellate Procedure

Rule 3c of the appellate Rules was amended in 1979 to provide that "an appeal shall not be dismissed for in-

formality of form or title of the notice of appeal." The notes of the Advisory Committee make it clear that if a paper is filed "indicating an intention to appeal," it should be so considered by the Court of Appeals.

In this case, petitioner requested an injunction pending appeal, as required by the appellate Rules, as the preliminary to application to the Court of Appeals, evidencing a clear intention to appeal.

The Court of Appeals' decision would appear to be inconsistent with its own case of *Cutting v. Bullerdick* (9th Cir. 1949), 178 F.2d 778, where the court held that Rule 3 could be satisfied by a motion to stay execution, but in any event, it is in conflict with *Cobb v. Lewis* (5th Cir. 1974), 488 F.2d 41, cited by the Advisory Committee; *O'Neal v. United States* (CA, ALA), 272 F.2d 412 (appeal bond); and *Shannon v. United States* (D.C. Cir. .....), 206 F.2d 479 (application to proceed in forma pauperis).

The decision of the Court of Appeals directly defies this Court's admonition in *Foman v. Davis*, 371 U.S. 178, not to avoid decisions on the merits on the basis of mere technicalities.

Furthermore, the grounds of the court's decision would appear to be based upon a premise, if not incorrect under the decisions of the Ninth Circuit, is in conflict with the decisions of other circuits and of this Court.

The weight of authority and this Court have held that a Rule 60b motion can be considered during the pendency of an appeal and the District Court has jurisdiction. In *Standard Oil of California v. United States* (1976), 429 U.S. 17, the Court stated that the trial court is in a much

better position to pass upon the issues presented in a motion pursuant to Rule 60b. *See, also, Ryan v. United States Lines* (2d Cir. 1962), 303 F.2d 430; *Oliver v. Home Indemnity Co.* (5th Cir. 1972), 470 F.2d 329.

In this case, the Court of Appeals resolved an apparent ambiguity against this litigant's right to have its case decided on the merits, contrary to the widely stated maxim of federal judicial procedure.

In passing, petitioner cannot help but comment that in spite of the Court of Appeals' statement that the previous unpublished Order of the Ninth Circuit was not a "limited remand," an examination of that Order, in light of the fact that an election was at that time pending, leads to the conclusion that the Court of Appeals wanted a factual determination by the district court to determine whether it had jurisdiction to review on case or controversy grounds.

**2. The decision raises significant and recurrent problems concerning efforts to control by federal judicial action state agricultural labor regulation preempted by the National Labor Relations Act**

The Court of Appeals' decision approves the narrow ruling of the district court, holding that even if a representational election is pending, there is no "case or controversy" because the threatened State regulation is "still speculative and hypothetical." Such a ruling, as a practical matter, grants immunity from Federal action to control a State agricultural labor Board which refuses to follow the determinations of Federal jurisdiction made by the National Labor Relations Board. In a broader sense,

it forecloses the possibility of any Federal inquiry into State action which invades the province of the National Labor Relations Act.

The period of time covered by a State regulated representational election is necessarily short. By denying Federal jurisdiction over threatened regulation, this decision, under these circumstances, makes review impossible. Once an election is held, the damage is done. A winning union would be entitled to represent the employees in question even under Federal law.

The decision of the district court approved by the Court of Appeals is directly in conflict with this Court's decision in *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115. Obviously, the State labor regulation involved here has been and is capable of repetition. Just as obviously, the decisions of the Court of Appeals and the district court allow that State action to evade Federal review.

This case is also in conflict with *Florida Board of Business Regulations v. NLRB,* 605 F.2d 916. Furthermore, it appears inconsistent with this Court's decision in *Babbitt v. United Farm Workers,* 442 U.S. 289. The problem presented here is not unique to petitioner. Petitioner, of course, has a strong case since the National Labor Relations Board has actually ruled that it is subject to Federal jurisdiction. However, the problem extends to many other business organizations in the agricultural field whose labor relations under the law are preempted by the National Labor Relations Act.

The problem is compounded by this Court's decision in *Boire v. Greyhound,* 376 U.S. 473, which denies judicial review to an employer with respect to representation. On

an employer petition to have its representational elections conducted by the Federal authority, a denial, either by the staff of the National Labor Relations *Board* or *by the Board* would preclude review by the Federal judiciary on the question of whether under the law the employer's employees were subject to the National Labor Relations Act. The present decision precludes review even where the State initiates proceedings, in defiance of prior findings by the National Labor Relations Board.

### 3. The decision raises significant and recurrent problems with respect to the scope of review of Rule 60b motions

This case involves a special, but not exceptional, situation where the district court has denied jurisdiction and refused to consider the merits. In view of the Federal judicial policy favoring a decision on the merits, such a decision should not be unduly extended.

The case involves another special, but not exceptional, situation in that the Rule 60b motion was made after the ten-day period for moving for a new trial, but within the time for appeal. As Judge Friendly stated in *Schildhaus v. Moe* (2d Cir. 1964), 335 F.2d 529, 531:

> "Under such circumstances there is indeed good sense in permitting the trial court to correct its own error and, if it refuses, in allowing a timely appeal from the refusal; no good purpose is served by requiring the parties to appeal to a higher court, often requiring remand for further trial proceedings, when the trial court is equally able to correct its decision in the light of new authority on application made within the time permitted for appeal."

*See, also, Meadows v. Cohen* (5th Cir. 1969), 409 F.2d 750; *Tarkington v. United States Lines* (2d Cir. 1955), 222 F.2d 358; *Oliver v. Home Indemnity Co.* (5th Cir. 1972), 470 F.2d 329.

The new facts which were brought to the attention of the trial court were important. While petitioner believes that the court's denial of jurisdiction was unduly restrictive, in view of this Court's decision in *Super Tire, supra,* nevertheless, what was called to the attention of the court was State action. Even if it could be denied that there was a case or controversy when the Union took action, it should not be denied that there was a case or controversy when the State of California itself acted. We cannot help but wonder, in any event, why the district court, when faced with an ongoing election process and after holding the case under submission for almost seven months, dismissed the complaint just as a situation which would fit its narrow definition of jurisdiction was arising.

The problem here, however, has broader implications. When a district court has denied jurisdiction and the necessary jurisdictional facts are brought to its attention before the time for appeal has expired and jurisdiction is retained in the district court, the court should act. In these circumstances, much judicial time will be saved and certainly the ends of justice will be served by speedier decision.

In reviewing such a decision, we believe the entire question of jurisdiction is raised. The Court of Appeals claims here that the court was acting within its discretion. There cannot be any judicial discretion to deny jurisdiction when jurisdiction exists.

Rule 60b, properly interpreted, could be a useful tool in exceptional circumstances. Cases do not always fit themselves within the narrow time limits contemplated under the Federal Rules. In exceptional circumstances, such as the one here, manifest injustice can be avoided. This Court should grant review with a view to advising the courts below that Rule 60b can and should be utilized in a liberal and just way so as to favor decisions on the merits.

**4. The merits of the case below raise important issues with respect to the labor relations of the interstate agricultural industry which should be reviewed by this court**

The issues in this case are important to petitioner, specifically, since it involves the question of whether petitioner is subject to Federal or State law with respect to its labor relations. The case raises the question of whether a State is subject to the same rule as the Federal courts with respect to the deference which should be shown to the National Labor Relations Board under *Bayside Enterprises v. NLRB, supra.*

The case further involves an issue not raised in *Babbitt v. United Farm Workers, supra,* as to whether the states can, in view of the commerce clause, regulate interstate agricultural labor relations. It also raises the question as to whether United Farm Workers union is subject to the prohibitions against secondary boycotts contained in the National Labor Relations Act and questions the present validity of *DiGiorgio v. NLRB,* 191 F.2d 642 in view of this Court's decision in *National Broilers Marketing Association v. U.S.,* 436 U.S. 816 where this Court held even one non-agricultural member would destroy an agricultural

exemption. We think a similar rule should apply under the National Labor Relations Act where a union has, or attempts to have, membership which is not agricultural.

These grave questions, important to petitioner in particular and to the agricultural industry in general, should be resolved by this Court or this Court should direct the Court of Appeals to disregard technicalities and decide the questions before it.

Respectfully submitted,

RICHARD H. FOSTER
*Attorney for Petitioner*

**(Appendices follow)**